Rel: June 23, 2023



# Alabama Court of Criminal Appeals

## OCTOBER TERM, 2022-2023

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## CR-2022-0651

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**C.L.A.**

**v.**

**State of Alabama**

**Appeal from Elmore Circuit Court**
**(CC-20-55)**

McCOOL, Judge.

C.L.A. appeals his conviction for sexual abuse of a child less than 12 years old, see § 13A-6-69.1, Ala. Code 1975. C.L.A. was sentenced, as a habitual felony offender, to 35 years in prison.

Facts and Procedural History

C.L.A. was married to Je.C., who is the mother of the victim, Ja.C. C.L.A. and Je.C. have two children together (C.A. and B.A.). C.L.A. has known Ja.C. since she was very young, but he is not her biological father.

Even though C.L.A. and Je.C. had recently divorced, they took all the children to a local lake together on September 7, 2019.[1] Ja.C. testified that after returning home from the lake, she was lying on the bed in her room while her mother went to the store. Ja.C. said that C.L.A. entered her room and straddled her on the bed. C.L.A. then began touching Ja.C.'s breasts and vagina. He continued to touch her for several minutes. He stopped touching her when Je.C. returned from the store and entered the room. Ja.C. testified that she was born on September 19, 2007; thus, she was 11 years old at the time of the incident.

Je.C. testified that shortly after she returned to the house from the store, she opened the door to Ja.C.'s room and saw C.L.A. and Ja.C. on the bed and that C.L.A. was "on top of" Ja.C. Je.C. saw C.L.A.'s right hand inside Ja.C.'s shorts and his left hand underneath her shirt. C.L.A.

[1]According to the record before us, Je.C. filed a complaint for divorce on March 14, 2019. (C. 111.) Je.C. and C.L.A. filed an agreement to settle their affairs on July 15, 2019. (C. 119.) A judgment of divorce was issued by the Elmore Circuit Court on September 3, 2019. (C. 129.)

stopped touching Ja.C. when Je.C. started screaming at him. C.L.A. told Je.C. that she was hallucinating. After Je.C. told C.L.A. to leave and telephoned the police, C.L.A. left the house.

On the night of the incident, Ja.C. underwent a sexual-assault examination at Children's Hospital of Alabama in Birmingham. The examination did not reveal any injuries. However, one of the nurses who participated in the examination testified that most sexual-assault examinations do not reveal any injuries and that the lack of injuries does not mean that the victim was not assaulted. On September 11, 2019, Ja.C. was interviewed by a forensic-interview specialist at Butterfly Bridge Children's Advocacy Center. During that interview, which was played in open court, Ja.C. described the sexual abuse.

Je.C. admitted that, despite the incident, she spent two nights at the beach with C.L.A. in May 2020. She also admitted that, on another occasion after September 7, 2019, she asked C.L.A. to drive to Talladega to pick her up because she had had too much to drink.

C.L.A. testified that after they returned from the lake and Je.C. went to the store, Ja.C. held a blanket in front of the television "to get a stir out of [him] so that [he] would pillow fight with her, you know, pretty

much get up off the couch and interact with [the kids]." (R. 110.) According to C.L.A., he chased Ja.C. to her bedroom and tickled her on her bed until Je.C. walked in and immediately went "crazy." C.L.A. testified that it was not unusual for him to tickle the kids. He further testified that, to his knowledge, he never touched Ja.C.'s crotch area and that "if [he] did, it wasn't intentional." (R. 112.) He also testified that he did not intentionally touch her breasts and that every touching that happened was on the outside of Ja.C.'s clothes.

C.L.A.'s trial began on January 12, 2022. At the conclusion of the trial, the jury found C.L.A. guilty of sexual abuse of a child less than 12 years old. He was sentenced on February 28, 2022. On March 26, 2022, C.L.A. filed a motion for a new trial. The State did not respond to the motion. On March 28, 2022, the trial court set the motion for a hearing on May 12, 2022. However, on May 12, 2022, the trial court issued an order stating that the motion for a new trial was moot because it was denied by the operation of law.[2]

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[2]Rule 24.4, Ala. R. Crim. P., provides:

"No motion for new trial or motion in arrest of judgment shall remain pending in the trial court for more than sixty (60) days after the pronouncement of sentence, except as provided in this section. A failure

Discussion

I.

On appeal, C.L.A. makes two arguments. First, C.L.A. argues that the jury's verdict was contrary to the weight of the evidence.

In Adams v. State, 336 So. 3d 673 (Ala. Crim. App. 2020), this Court stated:

> "With respect to the weight of the evidence, it is well settled:
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> > "'[T]his Court will not upset the jury's verdict except in extreme situations in which it is clear from the record that the evidence against the accused was so lacking as to make the verdict wrong and unjust. Deutcsh v. State, 610 So. 2d 1212, 1234-35 (Ala. Cr. App. 1992). This Court will not substitute itself for the jury in determining the weight and probative force of the evidence. Benton v. State, 536 So. 2d 162, 165 (Ala. Cr. App. 1988).'
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> "May v. State, 710 So. 2d 1362, 1372 (Ala. Crim. App. 1997). See also Williams v. State, 10 So. 3d 1083, 1087 (Ala. Crim. App. 2008). Furthermore, '[t]he weight and probative value to

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by the trial court to rule on such a motion within the sixty (60) days allowed by this section shall constitute a denial of the motion as of the sixtieth day; provided, however, that with the express consent of the prosecutor and the defendant or the defendant's attorney, which consent shall appear in the record, the motion may be carried past the sixtieth day to a date certain; if not ruled upon by the trial court as of the date to which the motion is continued, the motion is deemed denied as of that date, unless it has been continued again as provided in this section. The motion may be continued from time to time as provided in this section."

> be given to the evidence, the credibility of the witnesses, the resolution of conflicting testimony, and inferences to be drawn from the evidence are for the jury.' Smith v. State, 698 So. 2d 189, 214 (Ala. Crim. App. 1996), aff'd, 698 So. 2d 219 (Ala. 1997)."

336 So. 3d at 686.

Section 13A-6-69.1(a), Ala. Code 1975, provides: "A person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact." "Sexual contact" is defined as "[a]ny touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party. The term does not require skin to skin contact." § 13A-6-60(3), Ala. Code 1975.

In the present case, Ja.C. testified that C.L.A. touched her breasts and vagina for several minutes and that she was 11 years old when the incident occurred. Je.C. testified that she saw C.L.A. "on top of" Ja.C. and saw C.L.A.'s right hand inside Ja.C.'s shorts and his left hand underneath her shirt. C.L.A. testified that he was merely tickling Ja.C. and that he did not subject her to sexual contact. On appeal, C.L.A. argues that Ja.C.'s "allegation simply is not credible under the dynamics of the household that day" and that his story is "far more plausible and

believable." C.L.A.'s brief, at 11. However, judging the credibility of the witnesses and resolving the conflicting testimony are proper functions of the jury, not this Court. See Adams, supra. The evidence against C.L.A. was not so lacking as to make the verdict wrong and unjust. Therefore, C.L.A.'s argument that the jury's verdict was contrary to the weight of the evidence is without merit.

II.

Lastly, C.L.A. argues that this Court should remand the case to the trial court for that court to conduct a hearing on his motion for a new trial, which was denied by operation of law. Specifically, C.L.A. contends that the trial court should conduct a hearing on his claim that after the trial, a witness disclosed that, "last fall," he heard Ja.C. say that the incident with C.L.A. "did not happen and that she and her mother made it up to get attention and money." The witness did not mention to anybody what he had heard until after he heard his grandmother talking about C.L.A.'s case. In support of his allegation, C.L.A. attached a redacted affidavit from the witness.[3] The State never responded to the

[3]The affidavit redacted the name of the witness because he is a minor. The name of the victim and the name of the notary were also

motion for a new trial. The trial court set the motion for a hearing on May 12, 2022. However, because C.L.A.'s sentenced was pronounced on February 28, 2022, the motion for a new trial was denied by operation of law on April 29, 2022, see Rule 24.4, Ala. R. Crim. P., and on May 12, 2022, the trial court issued an order stating that the motion for a new trial was moot because it had already been denied by the operation of law.

In Ex parte Heaton, 542 So. 2d 931 (Ala. 1989), the Alabama Supreme Court stated:

> "The standard of review for cases involving the grant or denial of a new trial based on newly discovered evidence is the same as that for a motion to withdraw a guilty plea.
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> > "'"The appellate courts look with disfavor on motions for new trials based on newly discovered evidence and the decision of the trial court will not be disturbed absent abuse of discretion." Further, "this court will indulge every presumption in favor of the correctness" of the trial judge's decision. The trial court is in the best position to determine the credibility of the new evidence.'
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> "Isom v. State, 497 So. 2d 208, 212 (Ala. Crim. App. 1986) (citations omitted). To establish a right to a new trial based on newly discovered evidence, the petitioner must show the following: (1) that the evidence will probably change the result

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redacted. C.L.A.'s counsel stated that the original affidavit is in his possession.

if a new trial is granted; (2) that the evidence has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. See Clements v. State, 521 So. 2d 1378, 1381 (Ala. Crim. App. 1988); Smitherman v. State, 521 So. 2d 1050, 1055 (Ala. Crim. App. 1987), cert. denied, 521 So. 2d 1062 (Ala. 1988); Isom, 497 So. 2d 208, 212 (Ala. Crim. App. 1986); Griffin v. State, 500 So. 2d 83, 91 (Ala. Crim. App. 1986); Baker v. State, 477 So. 2d 496, 504 (Ala. Crim. App. 1985), cert. denied, 475 U.S. 1029, 106 S. Ct. 1231, 89 L. Ed. 2d 340 (1986); Simas v. State, 432 So. 2d 30, 31 (Ala. Crim. App. 1983); and Bland v. State, 390 So. 2d 1098, 1102 (Ala. Crim. App. 1980), cert. denied, 390 So. 2d 1109 (Ala. 1980). While all five requirements ordinarily must be met, the law has recognized that in certain exceptional circumstances, even if the newly discovered evidence is cumulative or impeaching, if it appears probable from looking at the entire case that the new evidence would change the result, then a new trial should be granted. See Maund v. State, 254 Ala. 452, 462, 48 So. 2d 553, 562 (1950); Slaughter v. State, 237 Ala. 26, 27, 185 So. 373, 373 (1938); Jones v. State, 469 So. 2d 713, 715 (Ala. Crim. App. 1985); and Story v. State, 439 So. 2d 1317, 1322 (Ala. Crim. App. 1983). This Court in Slaughter v. State, 237 Ala. 26, 185 So. 373 (1938), recognized the exception as follows:

> "'The authorities generally recognize the rule that ordinarily such impeaching or contradicting testimony does not suffice for a new trial, though there are exceptional instances where such proffered proof may justify a reconsideration of the cause.'

"Id., 237 Ala. at 27, 185 So. at 373 (emphasis added). Those exceptional circumstances subsequently were defined by this Court in Maund v. State, 254 Ala. 452, 48 So. 2d 553 (1950).

> "'[T]he overruling of a motion for a new trial based upon newly discovered evidence tending only to discredit the State's witnesses is not error unless upon the whole case it appears probable that the new evidence would change the result.'

"Id., 254 Ala. at 462, 48 So. 2d at 562 (citations omitted) (emphasis added).

"We recognize the existence of recent caselaw that seems to reject the exception for newly discovered cumulative or impeaching evidence that would probably change the result of a trial. See, e.g., Isom v. State, 497 So. 2d 208 (Ala. Crim. App. 1986); Baker v. State, 477 So. 2d 496 (Ala. Crim. App. 1985); and Bland v. State, 390 So. 2d 1098 (Ala. Crim. App. 1980). Those cases seem to hold that cumulative or impeaching evidence will never establish a right to a new trial. However, it is evident that in each of those cases, the newly discovered evidence, when viewed in light of the other evidence presented at trial, most likely would not have changed the result. Therefore, a new trial under those circumstances would be unjustified. However, those cases should not be taken as precluding a new trial on the basis of newly discovered evidence simply because the new evidence is cumulative or impeaching if that evidence would probably change the result if a new trial were granted.

"The law further requires that the newly discovered evidence 'have been in existence, though not known, at the time of the original trial.' Smitherman v. State, 521 So. 2d 1050, 1055 (Ala. Crim. App. 1987), cert. denied, 521 So. 2d 1062 (Ala. 1988) (emphasis in original). In addition, the trial court will not be put in error for refusing to grant a new trial when the newly discovered evidence would not be admissible upon a retrial of the case. Id."

542 So. 2d at 933-34 (some emphasis added).

In Edgar v. State, 646 So. 2d 683 (Ala. 1994), the Alabama Supreme Court stated:

> "We hold that where, as here, a criminal defendant's motion for a new trial is denied under the provisions of Rule 24.4, Ala. R. Crim. P., without an affirmative statement by the trial judge giving the ruling a presumption of correctness and the defendant supports his new trial motion by evidence that was not presented at trial, and that evidence, if not controverted by the State, will entitle him to a new trial, the denial by operation of law should be reversed and the case remanded for the trial court to conduct a hearing on his motion for new trial and then enter an order either granting or denying the motion."

646 So. 2d at 687. Furthermore, "[i]n order to carry out the purpose of the Rules of Criminal Procedure, and to ensure the speedy and less expensive handling of a criminal case, all matters relating to the question of whether to grant a new trial should be dealt with in the trial court." Id. at 688.

In the present case, it appears that the trial court intended to hold a hearing on the motion for a new trial, but the motion was denied by operation of law before the scheduled hearing. Thus, there is no affirmative statement by the trial judge giving the denial of the motion a presumption of correctness. C.L.A. supported the motion with evidence that was not presented at trial, and the State did not respond to C.L.A.'s

motion or to that evidence in the trial court. On appeal, the State argues that the evidence would not be admissible at trial because, according to the State, it is hearsay. However, to the extent that the evidence is offered to impeach or discredit the witnesses, it is not substantive evidence, i.e., it is not offered "to prove the truth of the matter asserted"; thus, it is not hearsay. See Rule 801(c), Ala. R. Evid. (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

The determining factor in the present case was whether the jury believed C.L.A.'s account of the incident or the accounts of the victim and her mother. There was no physical evidence of the crime. Consequently, the credibility of the witnesses was extremely important, and the evidence attached to C.L.A.'s motion for a new trial directly attacks the credibility of the victim and her mother. In this particular case, the question whether to grant a new trial should be dealt with first in the trial court, which is in the best position to determine the credibility of the new evidence.

## Conclusion

Based on the foregoing, we reverse the denial of C.L.A.'s motion for a new trial and remand the case with instructions for the trial court to conduct a hearing concerning C.L.A.'s allegation that, after the trial, a witness disclosed that, "last fall," he heard Ja.C. say that the incident with C.L.A. "did not happen and that she and her mother made it up to get attention and money." After the hearing, the trial court should make specific, written findings of fact as to C.L.A.'s claim. The trial court may grant or deny relief as it deems appropriate. The trial court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible time and within 56 days after the release of this opinion. The return to remand shall include the State's response, if any; a transcript of the proceedings on remand conducted by the trial court; and the trial court's findings.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.